A **TAN POH YEE v. TAN BOON THIEN & OTHER APPEALS**

COURT OF APPEAL, PUTRAJAYA
ROHANA YUSUF JCA
IDRUS HARUN JCA
MARY LIM JCA
B [CIVIL APPEALS NO: W-02(IM)(NCC)-997-05-2016, W-02(IM)(NCC)-998-05-2016 & W-02(IM)(NCC)-1005-05-2016]
9 JANUARY 2017

C ***CIVIL PROCEDURE:*** *Striking out – Writ and statement of claim – Appellants' alleged failure to carry out obligations under agreement – Whether reasonable cause of action – Whether respondent had privity and right to sue – Whether respondent had locus standi to enforce agreement – Whether there was inordinate delay – Whether s. 6 of Limitation Act 1953 applied – Whether claim time barred – Whether lapse of time denied respondent's rights – Doctrine of laches and*
D *acquiescence under s. 32 of Limitation Act 1953 – Whether prevailed over remedies sought – Whether respondent's claim frivolous, vexatious and obviously unsustainable – Whether abuse of court process – Rules of Court 2012, O. 18 r. 19(1)(d) & O. 92 r. 4*

E ***LIMITATION:*** *Action – Cause of action – Accrual of – Precise date from which time begins to run – Whether on date of alleged breach of agreement – Whether s. 6 of Limitation Act 1953 applied – Whether claim time barred – Whether lapse of time denied respondent's rights – Doctrine of laches and acquiescence under s. 32 of Limitation Act 1953 – Whether prevailed over remedies sought*

F The respondent and the appellants were the children of the fourth defendant and the late Madam Chang Ying ('Madam') who had incorporated a company, Tan Kim Choo Holdings Sdn Bhd ('TKCH'.) The respondent's contentions were that there was a purported oral agreement in 2004 ('2004 agreement') between the fourth defendant, Madam and the appellants wherein the appellants were to relinquish and transfer their shares in TKCH
G to the fourth defendant and Madam. It was allegedly agreed at the meeting that the fourth defendant and Madam were to hold the shareholdings transferred by the appellants as trustees for the respondent. Following the demise of Madam, her own shares in TKCH totalling 233,392 units were transferred to the fourth defendant. However, the appellants refused or failed
H to transfer their 525,135 shares in TKCH to the fourth defendant in accordance with the purported 2004 agreement. Subsequently, the fourth defendant suffered a massive stroke and since then had difficulty in speech and was physically limited. The respondent was then notified of the appellants' intention to obtain a court order pursuant to the Mental Health
I Act 2001 to manage the property and interests of the fourth defendant. A notice under s. 149(1) of the Companies Act 1965 was received by the

respondent to requisition an extraordinary general meeting of TKCH to remove the respondent from the board of directors and to appoint the first and second appellants as directors of TKCH with immediate effect. The respondent alleged that the appellants had conspired amongst themselves to take over the interests and shares of the fourth defendant in TKCH. The respondent thus sought, *inter alia*, declarations that (i) the purported oral agreement in 2004 was valid and binding on the appellants; (ii) the appellants ceased to be shareholders of 525,135 shares in TKCH; (iii) the said shares belonged to the fourth defendant; and (iv) the extraordinary general meeting was void and illegal. The appellants in due course filed three separate applications pursuant to O. 18 r. 19(1)(a),(b) and (d) of the Rules of Court 2012 and under the inherent jurisdiction of the court pursuant to O. 92 r. 4 thereof seeking to strike out the respondent's amended writ of summons and statement of claim. The High Court dismissed the applications. Thus, there were three appeals before this court emanating from the said High Court's decisions, which were heard together. The issues that arose were (i) whether the respondent had a reasonable cause of action against the appellants pursuant to the purported 2004 agreement; (ii) whether the respondent's action was scandalous, frivolous and vexatious; and (iii) whether the respondent's claim was time-barred by virtue of s. 6(1)(a) of the Limitation Act 1953.

Held (allowing appeals)
Per Idrus Harun JCA delivering the judgment of the court:

(1) The respondent had firmly stated that any arrangement as to the alleged trust in relation to the appellants' shares in TKCH which was believed to be agreed to, was solely between the fourth defendant and Madam on the one part and the appellants on the other part. The respondent alleged that the appellants' shares in TKCH which the latter failed to transfer to the fourth defendant and Madam pursuant to the purported 2004 agreement meant that the appellants held the shares in bare trusts for the fourth defendant and that upon the passing of the fourth defendant the shares in question would be bequeathed and transferred to the respondent. The respondent had never paid any valuable consideration towards the alleged trust. Therefore, the respondent held no privity in respect of any agreement, arrangement or understanding between the fourth defendant and Madam on the one part and the appellants on the other part. (para 12)

(2) The pleadings and reliefs sought clearly disclosed that the claims by the respondent were actions to be brought by both the fourth defendant and the estate of the late Madam, and not the respondent. The respondent was not a party in or to the purported 2004 agreement. The respondent was merely a bystander with no privity and right to sue. Hence, the

respondent had no *locus standi* to enforce the purported 2004 agreement. Instead, the party ought to have been the fourth defendant or the estate of Madam. The respondent did not have a reasonable cause of action which consequently rendered his claim, which was premised on the purported 2004 agreement, plainly and obviously unsustainable and thus his suit was doomed to fail. The respondent was a stranger to the purported 2004 agreement and as a matter of law, could not take advantage of its provisions notwithstanding that some provisions thereof were intended to benefit him. (para 17)

(3) It was the respondent's obligation to ensure that all the material particulars and facts necessary to establish his case had been acquired before the filing of the claim. The respondent had failed to establish the existence of such purported 2004 agreement when the respondent could not provide or specify the precise date upon which it was entered into. The date for the conclusion of a valid contract, especially an oral one in this instant appeal, was pertinent and must be specific to achieve certainty. A party intending to rely on the oral agreement could not make an assumption of any date and failure to provide the precise date necessarily meant that the plaintiff had failed to prove the existence of the same. The respondent therefore had failed to plead and provide the material particulars as to the exact date of the purported 2004 agreement at this preliminary stage which was highly prejudicial to the appellants and fatal to the respondent's case. (paras 20-22)

(4) The respondent's cause of action revolved around the appellants' alleged failure to carry out the obligations under the purported 2004 agreement. One of the reliefs sought by the respondent was an order for the appellants to transfer their shares to the fourth defendant. Clearly the precise date from which time would start to run would be the date of the demise of Madam, as this was the date the respondent's cause of action founded on a contract would have arisen which was the date of the breach. Limitation therefore had set in after a slumber of nine years when the respondent commenced this action on 24 November 2015 which in the result effectively rendered the respondent's claim obviously unsustainable with no chance of success. Section 6 of the Limitation Act 1953 applied and consequently the respondent was precluded from bringing this action against the appellants. The claim was already barred by limitation. (para 28)

(5) The inaction by the fourth defendant, the late Madam and subsequently the estate of Madam from 2004 until the present day was obvious. They had been quiescent for an inordinately long time. Such long lapse of time would deny any rights that the respondent may have as the equitable doctrine of laches and acquiescence as provided under s. 32 of the Limitation Act 1953 would prevail over the remedies sought by the

respondent. The respondent's claim against the appellants was clearly frivolous and vexatious rendering it obviously unsustainable. The respondent's action was indeed lacking *bona fides* and was an abuse of the process of the court. Such conduct attracted the application of O. 18 r. 19(1)(d) of the Rules of Court 2012 and the inherent jurisdiction to prevent abuse of the court's process. (paras 30-32)

***Bahasa Malaysia** Headnotes*

Responden dan perayu-perayu adalah anak-anak defendan keempat dan si mati Madam Chang Ying ('Madam') yang menubuhkan sebuah syarikat, Tan Kim Choo Holdings Sdn Bhd ('TKCH'). Responden menghujahkan bahawa terdapat satu perjanjian lisan pada tahun 2004 ('perjanjian 2004') antara defendan keempat, Madam dan perayu-perayu dalam mana perayu-perayu akan melepaskan dan memindahkan saham mereka dalam TKCH kepada defendan keempat dan Madam. Responden mendakwa terdapat persetujuan bahawa defendan keempat dan Madam akan memegang saham-saham yang dipindahkan oleh perayu sebagai pemegang amanah untuk responden. Apabila Madam meninggal dunia, saham-sahamnya dalam TKCH berjumlah 233,392 unit dipindah kepada defendan keempat. Walau bagaimanapun, perayu-perayu enggan atau gagal memindahkan 525,135 saham mereka dalam TKCH kepada defendan keempat menurut perjanjian 2004. Seterusnya, defendan keempat mengalami serangan strok dan akibat itu sukar bertutur dan gerak gerinya secara fizikal terhad. Responden kemudiannya dimaklumkan berkenaan niat perayu-perayu untuk memperoleh perintah mahkamah bawah Akta Kesihatan Mental 2001 untuk menguruskan hartanah dan kepentingan defendan keempat. Satu notis bawah s. 149(1) Akta Syarikat 1965 diterima oleh responden untuk menuntut satu mesyuarat agung luar biasa TKCH bagi menyingkirkan responden dari lembaga pengarah dan melantik perayu pertama dan kedua sebagai pengarah-pengarah TKCH dengan serta merta. Responden mendakwa perayu-perayu berkomplot sesama mereka untuk mengambil alih kepentingan dan saham defendan keempat dalam TKCH. Oleh itu, responden, antara lain, menuntut deklarasi bahawa (i) perjanjian lisan 2004 sah dan mengikat perayu-perayu; (ii) perayu-perayu bukan pemegang 525,135 saham dalam TKCH; (iii) saham-saham tersebut adalah milik defendan keempat; dan (iv) mesyuarat agung luar biasa tidak sah dan menyalahi undang-undang. Perayu-perayu memfailkan tiga permohonan berbeza bawah A. 18 k. 19(1)(a), (b) dan (d) Kaedah-Kaedah Mahkamah 2012 dan bawah bidang kuasa mahkamah sedia ada bawah A. 92 k. 4 untuk tuntutan membatalkan writ saman terpinda dan pernyataan tuntutan responden. Mahkamah Tinggi menolak permohonan-permohonan tersebut. Oleh itu, terdapat tiga rayuan di hadapan mahkamah ini yang berbangkit susulan keputusan Mahkamah Tinggi tersebut, yang didengar bersama. Isu-isu yang dibangkitkan adalah (i) sama ada responden mempunyai kausa tindakan munasabah terhadap perayu-perayu di bawah

perjanjian 2004; (ii) sama ada tindakan responden melampau, meremehkan dan menyusahkan; dan (iii) sama ada tuntutan responden dilarang oleh had masa di bawah s. 6(1)(a) Akta Had Masa 1953.

Diputuskan (membenarkan rayuan-rayuan)
Oleh Idris Harun HMR menyampaikan penghakiman mahkamah:

(1) Responden telah menyatakan dengan kukuh bahawa apa-apa pengaturan berkenaan amanah yang didakwa berhubung saham-saham perayu dalam TKCH yang dipercayai telah dipersetujui, adalah semata-mata antara defendan keempat dan Madam pada satu bahagian dan perayu-perayu pada bahagian lain. Responden mendakwa bahawa saham-saham perayu dalam TKCH yang tidak dipindahkan kepada defendan keempat dan Madam menurut perjanjian 2004 bermaksud perayu-perayu memegang saham-saham secara amanah wadiah untuk defendan keempat dan apabila defendan keempat meninggal dunia saham-saham itu akan diwasiatkan dan dipindahkan kepada responden. Responden tidak pernah membayar apa-apa balasan bernilai kepada amanah yang didakwa itu. Dengan itu, responden tidak mempunyai priviti berkenaan apa-apa perjanjian, pengaturan atau pemahaman antara defendan keempat dan Madam pada satu bahagian dan perayu-perayu pada bahagian yang lain.

(2) Pliding-pliding dan relif-relif yang dituntut dengan jelas menunjukkan tuntutan oleh responden adalah tindakan yang sepatutnya dibawa oleh defendan keempat dan estet Madam, dan bukan responden. Responden bukan pihak yang terlibat dalam perjanjian 2004. Responden hanya orang luar yang tidak mempunyai priviti dan hak untuk menyaman. Oleh itu, responden tidak mempunyai *locus standi* untuk menguatkuasakan perjanjian 2004. Sebaliknya, pihak yang mempunyai *locus standi* adalah defendan keempat atau estet Madam. Responden tidak mempunyai kausa tindakan munasabah yang menyebabkan tuntutannya, berdasarkan perjanjian 2004, dengan jelas dan nyata tidak mampan dan oleh itu guamannya ditakdirkan gagal. Responden adalah pihak yang asing kepada perjanjian 2004 dan dari segi undang-undang, tidak boleh mengambil kesempatan atas peruntukan-peruntukannya walaupun peruntukan-peruntukan itu berniat untuk memanfaatkannya.

(3) Adalah kewajipan responden untuk memastikan segala bahan dan fakta penting yang diperlukan untuk membuktikan kesnya diperolehi sebelum pemfailan tuntutan. Responden gagal membuktikan kewujudan perjanjian 2004 apabila responden tidak dapat mengemukakan atau menentukan tarikh tepat meterai. Tarikh untuk kesimpulan kontrak yang sah, terutama sekali yang secara lisan dalam rayuan ini, adalah berkaitan dan mesti dinyatakan dengan khususnya bagi mencapai ketentuan. Pihak yang berniat untuk bergantung pada perjanjian lisan tidak boleh menganggarkan apa-apa tarikh dan kegagalan mengemukakan tarikh dengan tepat bermakna plaintif gagal

membuktikan kewujudan perjanjian itu. Responden dengan itu gagal memplidkan dan mengemukakan butir-butir penting tarikh sebenar perjanjian 2004 pada peringkat awalan dan ini amat memprejudiskan perayu-perayu dan mencacatkan kes responden.

(4) Kausa tindakan responden berkisar pada dakwaan kegagalan perayu-perayu menjalankan tanggungjawab mereka bawah perjanjian 2004. Salah satu relif yang dituntut oleh responden adalah untuk perintah agar perayu-perayu memindahkan saham-saham mereka kepada defendan keempat. Dengan jelasnya tarikh tepat dari mana masa akan mula berjalan adalah tarikh kematian Madam, kerana ini adalah tarikh kausa tindakan responden berdasarkan kontrak akan berbangkit iaitu pada tarikh pelanggaran. Oleh itu had masa telah bermula selepas sembilan tahun berdiam diri apabila responden memulakan tindakan ini pada 24 November 2015 yang mengakibatkan tuntutan responden tidak mampan tanpa peluang untuk berjaya. Seksyen 6 Akta Had Masa 1953 terguna pakai menyebabkan responden terhalang daripada membawa tindakan ini terhadap perayu-perayu. Tuntutan dihalang oleh had masa.

(5) Ketiadaan tindakan defendan keempat, Madam dan estet Madam dari tahun 2004 sehingga sekarang adalah jelas. Mereka tidak aktif untuk satu masa yang amat panjang. Kelewatan sedemikian menafikan apa-apa hak responden kerana doktrin kelengahan dan keakuran seperti yang diperuntukkan bawah s. 32 Akta Had Masa 1953 akan mengatasi remedi-remedi yang dituntut oleh responden. Tuntutun responden terhadap perayu-perayu dengan jelasnya adalah meremehkan dan menyusahkan, menyebabkannya ia tidak mampan. Tindakan responden tidak *bona fide* dan adalah satu salah guna proses mahkamah. Kelakuan seperti itu membangkitkan pemakaian A. 18 k. 19(1)(d) Kaedah-Kaedah Mahkamah 2012 dan bidang kuasa tersirat bagi menghalang penyalahgunaan proses mahkamah.

Case(s) referred to:

Bacom Enterprises Sdn Bhd v. Jong Chuk & Ors [2011] 1 LNS 440 CA ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Berjaya Development Sdn Bhd v. Keretapi Tanah Melayu Bhd & Anor [2007] 6 CLJ 687 CA ***(refd)***

Boustead Naval Shipyard Sdn Bhd v. Dynaforce Corporation Sdn Bhd [2014] 5 CLJ 533 CA ***(refd)***

Brilliant Team Management Sdn Bhd v. South East Pahang Oil Palm Sdn Bhd & Ors [2006] 2 CLJ 1218 HC ***(refd)***

Chong Nyuk Fung & Anor v. Loi Lung Kiong & Ors [1998] 5 CLJ 146 HC ***(refd)***

Choong Howei v. Cheah Choo Eng & Ors And Another Appeal [2015] 9 CLJ 689 CA ***(refd)***

Enersafe Sdn Bhd v. Megarina Sdn Bhd [2006] 2 CLJ 1021 CA ***(refd)***

Harapan Permai Sdn Bhd v. Sabah Forest Industries Sdn Bhd [2011] 1 CLJ 285 CA ***(refd)***

Johor Capital Holdings Sdn Bhd v. Frank Khoo Shao Hong [2002] 6 CLJ 288 HC ***(refd)***

Keongco Malaysia Sdn Bhd v. Ng Seah Hai [2011] 1 LNS 703 HC ***(refd)***

Malayan Banking Bhd v. Gan Kong Yam [1969] 1 LNS 105 HC ***(refd)***
New Straits Times (Malaysia) Bhd v. Kumpulan Kertas Niaga Sdn Bhd & Anor [1985] 1 LNS 1 FC ***(refd)***
Pacific Inter-Link Sdn Bhd v. Wilmar Trading Pte Ltd & Ors [2013] 7 CLJ 312 HC ***(refd)***
Pengiran Othman Shah Pengiran Mohd Yussof & Anor v. Karambunai Resorts Sdn Bhd & Ors [1996] 1 CLJ 257 CA ***(refd)***
Raja Zainal Abidin Raja Hj Tachik & Ors v. British-American Life & General Insurance Bhd [1993] 3 CLJ 606 SC ***(refd)***
Sampo Materials (M) Sdn Bhd v. Tenaga Nasional Bhd [2015] 9 CLJ 902 CA ***(refd)***
Sim Kie Chon v. Superintendent of Pudu Prison & Ors [1985] 2 CLJ 449; [1985] CLJ (Rep) 293 SC ***(refd)***
Yeong Ah Chee v. Lee Chong Hai & Anor and other Appeals [1994] 3 CLJ 20 SC ***(refd)***

Legislation referred to:
Companies Act 1965, s. 149(1)
Limitation Act 1953, ss. 6(1)(a), 32
Rules of Court 2012, O. 18 r. 19(1)(a), (b), (d), O. 92 r. 4

For the appellants - Ng Thiang Tuan, Keith Kwan & Chia Poh Yee; M/s Tuan, Mohd Zain & Co
For the respondent - K Shanmugam, Hasnal Rezua Merican & Mohd Ruzaini Zulkifli; M/s The Chambers of Kamarul Hisham & Hasnal Rezua

[Editor's note: Appeal from High Court, Kuala Lumpur; Suit No: 22NCC-383-11-2015 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Idrus Harun JCA:

Preliminaries

[1] There were three appeals before this court. These were Civil Appeal No: W-02(IM)(NCC)-997-05-2016, Civil Appeal No: W-02(IM)(NCC)-1005-05-2016 and Civil Appeal No: W-02(IM)(NCC)-998-05-2016. We found it convenient and appropriate to hear the three appeals together as they arose from one civil action in the Kuala Lumpur High Court under Suit No: 22NCC-383-11-2015. The appeals therefore were related whilst undeniably involving the same parties besides the same common core facts and issues. We propose to give reasons for our decisions with respect to these appeals in one common judgment. Before proceeding further, we may mention that in the court below, the respondent herein, namely Tan Boon Thien as plaintiff, commenced this action against the three appellants and Tan Kim Choo @ Tan Kim Choon as the fourth defendant by way of a writ of summons and statement of claim. The respondent was seeking *inter alia* declarations that a purported oral agreement in 2004 was valid and binding on the appellants, that the appellants ceased to be shareholders of 525,135 shares in Syarikat Tan Kim Choo Holdings Sdn Bhd and the said shares

belonged to the fourth defendant. The respondent also sought an order that the appellants do transfer these shares to the fourth defendant. A declaratory order was also sought by the respondent that the extraordinary general meeting of Syarikat Tan Kim Choo Holdings Sdn Bhd requisitioned pursuant to s. 149(1) of the Companies Act 1965 on 30 October 2015 was void and illegal.

[2] The appellants in due course filed three separate applications pursuant to O. 18 r. 19(1)(a), (b) and (d) of the Rules of Court 2012 and under the inherent jurisdiction of the court pursuant to O. 92 r. 4 thereof seeking to strike out the respondent's amended writ of summons dated 23 February 2016 and statement of claim dated 22 January 2016. The High Court dismissed the applications. The learned judge, however notably did not give any grounds for such dismissal. The appeals before this court emanated from the said High Court's decisions in dismissing the appellants' applications. We shall refer to the appellant namely Tan Poh Yee in appeal number 997 as 'the first appellant', Tan Poh Hui in appeal number 1005 as 'the second appellant' and Tan Poh Lee in appeal number 998 as 'the third appellant' and collectively we shall refer to them as the appellants.

[3] Before proceeding further, it is necessary to mention that, at the commencement of this suit, the respondent filed the writ of summons and the statement of claim on 24 November 2015 as the second plaintiff whilst the fourth defendant who was the respondent's father, was named as the first plaintiff apparently without the instruction of the latter. Subsequently, the respondent changed or amended the capacity of the first plaintiff at a preliminary stage of this action to the fourth defendant pursuant to an order dated 17 February 2016.

The Facts

[4] The background to this case is set out comprehensively in the amended statement of claim. We begin by stating that the respondent's cause of action on the face of the pleadings reveals the undisputed fact that the respondent and the appellants are the children of the fourth defendant and the late Madam Chang Ying. On 21 June 1989, the fourth defendant, together with the late Madam Chang Ying incorporated Tan Kim Choo Enterprise Sdn Bhd pursuant to the Companies Act 1965. Subsequently, on 16 May 1997, the company's name was changed to its present name, Tan Kim Choo Holdings Sdn Bhd ("TKCH"). Since 12 December 1989 and until the demise of Madam Chang Ying on 31 July 2006, the particulars of TKCH's shareholdings were as follows:

(a) the fourth defendant - 233,393 shares (20%)

(b) Madam Chang Ying - 233,392 shares (20%)

(c) the respondent - 175,045 shares (15%)

(d) the first appellant - 175,045 shares (15%)

(e) the second appellant - 175,045 shares (15%)

(f) the third appellant - 175,045 shares (15%)

[5] The respondent's contentions in his pleaded case in a nutshell were confined to his assertion that there was a purported oral agreement in 2004 (the purported 2004 agreement) between the fourth defendant, Madam Chang Ying and the appellants wherein the appellants were to relinquish and transfer their shares in TKCH to the fourth defendant and Madam Chang Ying. The purported 2004 agreement was made at a meeting in Singapore when the fourth defendant, who was stricken with nose cancer at the relevant time, was undergoing treatment at Gleneagles Hospital. The meeting, the respondent alleged, was attended by the respondent, the appellants, the late Madam Chang Ying and the solicitor for the family namely Chew Phye Keat who witnessed the agenda discussed and the agreement reached thereat. These shares, totalling 525,135 units, were purportedly agreed to be transferred in the following manner:

(a) 175,045 shares were to be transferred by the third appellant to the fourth defendant;

(b) 175,045 shares were to be transferred by the second appellant to Madam Chang Ying;

(c) 87,523 shares were to be transferred by the first appellant to the fourth defendant; and

(d) 87,522 shares were to be transferred by the first appellant to Madam Chang Ying.

[6] It was allegedly agreed at the meeting that the fourth defendant and Madam Chang Ying were to hold the shareholdings transferred by the appellants as trustees for the respondent. Upon the passing of the fourth defendant and Madam Chang Ying, the shareholdings transferred by the appellants (totalling 525,135 shares) would be bequeathed and transferred to the respondent. The control of the management in TKCH should always be left in the hands of the fourth defendant.

[7] The respondent further averred that property in Brickfields held under titles 4461 to 4466, Lots 408 to 413, Seksyen 55 in the District of Kuala Lumpur ("the Brickfields property") owned by TKCH would be transferred to a company incorporated for the purpose of holding the Brickfields property. The shareholdings of this newly incorporated company would be entirely held by the fourth defendant and Madam Chang Ying as trustees for the appellants. Upon the passing of the fourth defendant and Madam Chang Ying, the shareholdings of this newly incorporated company would be bequeathed and transferred to the appellants. However, as events transpired,

the first and second appellants' shares in TKCH totalling 262,567 units which were supposed to be transferred to Madam Chang Ying were not transferred. The respondent alleged those shares thus to be improperly held by the appellants. The respondent also alleged that the appellants failed to transfer their shares in TKCH to the fourth defendant.

[8] The Brickfields property owned by TKCH was sold to Median Vision Sdn Bhd (Median Vision) for RM6,000,000 as valuable consideration pursuant to a sale and purchase agreement dated 27 May 2004 (exh. F). Median Vision for the aforementioned purpose was incorporated upon the return of the family from Singapore but the respondent alleged that contrary to the purported 2004 agreement, the appellants became the majority shareholders holding 6,200,000 shares whilst the fourth defendant and Madam Chang Ying were the nominal shareholders thereof. It was further alleged that Median Vision never paid the purchase sum of RM6,000,000 to TKCH. It was the respondent's pleaded case that upon the completion of the transfer of the Brickfields property from TKCH to Median Vision which was controlled by the appellants, they were under the obligation to transfer their 525,135 shares in TKCH to the fourth defendant and Madam Chang Ying. Madam Chang Ying in the meanwhile had on 5 August 2004 executed a will with regard to the distribution of the estate after her demise. This will was alleged to have reflected the purported 2004 agreement (exh. G). Following the demise of Madam Chang Ying on 31 July 2006, her own shares in TKCH totalling 233,392 units were transferred to the fourth defendant. However, the appellants refused or failed to transfer their 525,135 shares in TKCH to the fourth defendant in accordance with the will and thereby the purported 2004 agreement. The respondent asserted that the appellants' continued holding of their 525,135 shares in TKCH after the purported 2004 agreement until to date was merely as bare trustees for the fourth defendant.

[9] In or around 3 August 2015, the fourth defendant suffered a massive stroke. Since then, he has difficulty in speech and was physically limited. By a letter dated 3 November 2015 sent by the appellants' solicitors namely Messrs Mohd Zain & Co to the respondent, the latter had been notified of the appellants' intention to obtain a court order pursuant to the Mental Health Act 2001 to manage the property and interests of the fourth defendant as he was unable to articulate and communicate his intentions clearly and would not be able to make complex decisions concerning his wellbeing, finances and his care. On 30 October 2015, a notice (exh. N) under s. 149(1) of the Companies Act 1965 was received by the respondent to requisition the extraordinary general meeting of TKCH on 30 November 2015 to remove the respondent from the board of directors and to appoint the first and second appellants as directors of TKCH with immediate effect. A pertinent point to note is that the directors of TKCH at the material time were the fourth defendant, the respondent and the third appellant. The respondent alleged that the notice in question was issued and the general meeting was convened

with bad intention. The respondent additionally alleged that the appellants had conspired amongst themselves to take over the interests and shares of the fourth defendant in TKCH contrary to the purported 2004 agreement, to remove the respondent from TKCH's board and to appoint the first and second appellants as directors.

Our Deliberation And Decision

[10] Based on the information that we had garnered from the notices of application and the affidavits in support thereof, the appellants, in seeking to strike out the amended writ of summons and statement of claim, relied in the main on the grounds that the respondent's pleaded case disclosed no reasonable cause of action, was scandalous, frivolous and vexatious and an abuse of process of the court as set out respectively under O. 18 r. 19(1)(a), (b) and (d) of the Rules of Court 2012. The law may now seem obvious and trite that in determining whether any claim ought to be struck out pursuant to O. 18 r. 19 of the Rules of Court 2012, recourse to this summary process can only be adopted when it can clearly be seen that the claim is on the face of it obviously unsustainable. The summary power should be exercised in plain and obvious cases only and where the claim on the face of it is obviously bound to fail (*Enersafe Sdn Bhd v. Megarina Sdn Bhd* [2006] 2 CLJ 1021). Quite apart from this authority, we should say that there is an abundance of authority for this proposition and it would suffice for this purpose if reference in this connection is made to the Supreme Court's decision in the case of *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36 of which the relevant excerpt at p. 11 (CLJ); p. 37 (MLJ) is reproduced below:

> The principle upon which the court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) of the Rules of the High Court 1980 are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule and the summary procedure can only be adopted when it can clearly be seen that a claim or answer is on the face of it obviously unsustainable.

[11] Having stated the general principle of law, we would thus start off by deliberating on the argument urged for the appellants that the respondent's claim disclosed no reasonable cause of action. Learned counsel for the appellants on this point pressed with the argument that the decision of the High Court ought to be set aside as the learned judge failed to give due consideration to the main issue of whether the respondent had reasonable cause of action against the appellants pursuant to the purported 2004 agreement. The main plank in the appellants' submission on this ground was that the respondent had no privity of contract to enforce the purported 2004 agreement. This argument was founded on the fact that, on the face of the pleadings, at all material times, the purported 2004 agreement did not involve him. It therefore patently showed that there was no privity of contract between the appellants and the respondent.

[12] In our opinion, the respondent, as could be seen from his pleaded case, had firmly stated that any arrangement as to the alleged trust in relation to the appellants' shares in TKCH which was believed to be agreed to, was solely between the fourth defendant and Madam Chang Ying on the one part and the appellants on the other part. This fact could evidently be gleaned from the respondent's pleading in paras. 16 (a) and (b), 19, 23 and 30 of the amended statement of claim. It is to be remembered that the respondent alleged that the appellants' 525,135 units of shares in TKCH which the latter failed to transfer to the fourth defendant and the late Madam Chang Ying pursuant to the purported 2004 agreement meant that the appellants held the shares in bare trusts for the fourth defendant and that upon the passing of the fourth defendant the shares in question would be bequeathed and transferred to the respondent. At all material times, the respondent had never paid any valuable consideration towards the alleged trust. In our judgment, there is a good deal of substance in the argument put forward by learned counsel for the appellants that the respondent held no privity in respect of any agreement, arrangement or understanding between the fourth defendant and Madam Chang Ying on the one part and the appellants on the other part.

[13] We would further refer to para. 27 of the amended statement of claim in which the respondent had pleaded that the appellants had failed to transfer 262,567 units of shares of TKCH to the estate of Madam Chang Ying. We reproduce the entire para. 27 of the amended statement of claim below:

> P merujuk kepada Perjanjian Lisan 2004 dan memplidkan bahawa saham milik mendiang Puan Chang Ying di dalam Syarikat Tan Kim Choo adalah terdiri daripada 233,392 unit saham yang didaftarkan di atas nama mendiang Puan Chang Ying dan 262,567 unit saham yang sehingga kini masih dipegang oleh D1, D2 dan D3 secara tidak sah.

Added to that, in para. 30 of the amended statement of claim the respondent pleads:

> P memplidkan bahawa walaupun selepas kematian mendiang Puan Chang Ying, dan D1, D2 dan D3 (the appellants herein) mengetahui mengenai perenggan 4.1.1 wasiat mendiang Puan Chang Ying, D1, D2 dan D3 tetap, sehingga kini, enggan dan/atau cuai dan/atau abai memindahkan 525,135 unit saham yang masih dipegang oleh D1, D2 dan D3 di dalam Syarikat Tan Kim Choo kepada P1 (the fourth defendant herein) selaras dengan perenggan 4.1.1 wasiat mendiang Puan Chang Ying.

[14] It is perhaps necessary to mention that the matters relating to Madam Chang Ying's will are pleaded in para. 26 of the amended statement of claim and in para. 27 thereof. It did seem to us that the respondent claimed that Madam Chang Ying's shares also included the appellants' shares which they were supposedly required to transfer to her but were not and instead were said to be still improperly held by them. The crucial and essential point that

could be made from the above pleadings in paras. 27 and 30 of the amended statement of claim was that legally, any purported cause of action for the said shares laid with the estate of Madam Chang Ying and not, the respondent. On that basis, there was certainly force in the appellants' contention that it was plain and obvious that there was no privity in respect of any alleged agreement, arrangement or understanding between the appellants and the respondent upon which the respondent may mount his claim.

[15] The above submissions had been further augmented by reference to the fact that the respondent's pleadings and the declaratory reliefs sought by the respondent plainly reflected that the claim by the respondent was in effect and in actuality actions to be brought by the fourth defendant and not the respondent. Turning now to this point, it had been pressed on us in this appeal that the learned judge had erred as she had failed to give due consideration to this fact that the respondent had in his pleaded case shown that the claim was by the fourth defendant and the declaratory reliefs sought by the respondent were in truth for the fourth defendant. By virtue thereof, the respondent's claim in our judgment did not disclose a reasonable cause of action. To appreciate this contention, it would be desirable to set out the relevant pleadings which manifestly showed that the claim herein was or ought to be brought by the fourth defendant. In paras. 19, 23 and 30 the respondent pleaded as follows:

> 19 ... Pegangan D1, D2 dan D3 (the appellants herein) ke atas 525,135 unit saham di Syarikat Tan Kim Choo tersebut secara berterusan sebagai pemegang saham berdaftar selepas Perjanjian Lisan 2004 sehingga kini adalah semata-mata sebagai pemegang amanah kepada D4 (the fourth defendant herein").
>
> 23 ... Pegangan D1, D2 dan D3 (the appellants herein) ke atas 525,135 unit saham di Syarikat Tan Kim Choo tersebut secara berterusan sebagai pemegang saham berdaftar selepas Perjanjian Lisan 2004 sehingga kini adalah semata-mata sebagai pemegang amanah kepada D4 (the fourth defendant herein).
>
> 30 ... D1, D2 dan D3 (the appellants herein) tetap, sehingga kini, enggan dan/atau cuai dan/atau abai memindahkan 525,135 unit saham yang masih dipegang oleh D1, D2 dan D3 di dalam Syarikat Tan Kim Choo kepada P1 (the fourth defendant herein) selaras dengan perenggan 4.1.1 wasiat mendiang Puan Chang Ying.

[16] Further and as earlier stated, the declaratory reliefs sought by the respondent are effectively for the fourth defendant. Paragraph 50 of the amended statement of claim thus states as follows:

> 50. Oleh itu, P (the respondent herein) menuntut seperti berikut:
>
> (a) Suatu deklarasi bahawa Perjanjian Lisan 2004 adalah sah dan bahawa D1, D2 dan D3 adalah terikat dengan terma-terma yang telah dipersetujui di dalam Perjanjian Lisan 2004 tersebut;

(b) Suatu deklarasi bahawa D1, D2 dan D3 telah terhenti menjadi pemegang-pemegang 525,135 unit saham di dalam Syarikat Tan Kim Choo;

(c) Suatu deklarasi bahawa 525,135 unit saham di dalam syarikat Kim Choo tersebut adalah milik D4;

(d) Suatu perintah agar D1, D2 dan D3, dalam masa 14 hari daripada tarikh Perintah ini diberi, melaksanakan dan mendaftarkan Borang 32A Akta Syarikat bagi memindahkan 525,135 unit saham di dalam Syarikat Tan Kim Choo kepada D4; sekiranya selepas tempoh 14 hari tersebut telah tamat dan D1, D2 dan D3 gagal dan/atau cuai dan/atau enggan melaksanakan dan mendaftarkan Borang 32A Akta Syarikat bagi memindahkan 525,135 unit saham di dalam Syarikat Tan Kim Choo kepada P1 (D4), maka Timbalan Pendaftar atau Penolong Kanan Pendaftar Mahkamah yang Mulia ini diberi kuasa untuk melaksanakan dan mendaftarkan Borang 32A Akta Syarikat bagi memindahkan 525,135 unit saham di dalam Syarikat Tan Kim Choo kepada D4.

[17] There is not a scintilla of doubt that the pleadings and reliefs sought clearly disclosed that the claims by the respondent were actions to be brought by both the fourth defendant and the estate of the late Madam Chang Ying and not the respondent. And as aforementioned, the facts that could be gleaned from the respondent's pleadings clearly demonstrated that he was not a party in or to the purported 2004 agreement. He was, as it was clear to us, merely a bystander with no privity and right to sue. Hence, the respondent had no *locus standi* to enforce the purported 2004 agreement, instead, the party ought to have been the fourth defendant or the estate of Madam Chang Ying. It is apparent that the respondent did not have a reasonable cause of action which consequently rendered his claim, which was premised on the purported 2004 agreement, plainly and obviously unsustainable and thus his suit was doomed to fail. The respondent was a stranger to the purported 2004 agreement and as a matter of law, could not take advantage of its provisions notwithstanding that some provisions thereof were intended to benefit him.

[18] The fundamental principle of law on this point has been constantly followed and repeated by our courts that only a party to a contract can sue on it and only the parties to a contract have enforceable rights and obligations under such contract. We may categorically state, as an extension to this principle, that no stranger to the consideration can take advantage of a contract, although made for his benefit. We shall, in this regard, refer to the case of *Boustead Naval Shipyard Sdn Bhd v. Dynaforce Corporation Sdn Bhd* [2014] 5 CLJ 533; [2015] 1 MLJ 284 wherein Abdul Malik Ishak JCA handing down the judgment of this court said at pp. 560-561 (CLJ); pp. 307 to 308 (MLJ):

> [67] After *Tweddle v. Atkinson*, the doctrine of privity was firmly established as part and parcel of the English common law in the case of *Dunlop Pneumatic Tyre Co Ltd v. Selfridge & Co Ltd* [1915] AC 847 (HL). There, Viscount Haldane LC aptly said at p. 853:

> My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract *in personam*. A second principle is that if a person with whom a contract not under seal has been made is to be able to enforce it consideration must have been given by him to the promisor or to some other person at the promisor's request. These two principles are not recognised in the same fashion by the jurisprudence of certain Continental countries or of Scotland, but here they are well established.

[68] Mohamed Dzaiddin J (later the Chief Justice) rightly said in *Fima Palmbulk Services Sdn Bhd v. Suruhanjaya Pelabuhan Pulau Pinang & Anor* [1988] 1 MLJ 269 at p. 271 that, 'It is clear that the English doctrine of privity of contract applies to our law of contract'.

[69] The doctrine of privity of contract is here to stay. In *Murphy v. Bower* (1866) IR 2 CL 506, the court categorically stated that, 'no stranger to the consideration can take advantage of a contract, although made for his benefit'. Bluntly put, only the parties to the contract have enforceable rights and obligations under the contract.

[70] As an established principle of contract law, the common law doctrine of privity of contract stands for the simple proposition that, 'no one but the parties to a contract can be bound by it or entitled under it' (*Greenwood Shopping Plaza Ltd v. Beattie* [1980] 2 SCR 228, at p 229).

[19] This principle was similarly applied in the earlier case of *Bacom Enterprises Sdn Bhd v. Jong Chuk & Ors* [2011] 1 LNS 440; [2011] 5 MLJ 820 in which this court said at paras. 101 to 103:

[101] ... The plaintiff is definitely not a party to the sale agreement and hence cannot enforce or rely for protection on its provisions even if some provision therein was intended to benefit him. In *Scruttons Ltd v. Midland Silicones Ltd* [1962] AC 446, which dealt with the English position on the doctrine of privity, Lord Reid said (at pp. 472-473):

> In considering the various arguments for the appellants, I think it is necessary to have in mind certain established principles of the English law of contract. Although I may regret it, I find it impossible to deny the existence of the general rule that a stranger to a contract cannot in a question with either of the contracting parties take advantage of provisions of the contract, even where it is clear from the contract that some provision in it was intended to benefit him. That rule appears to have been crystallised a century ago in *Tweddle v. Atkinson* ((1861) 1 B & S 393) and finally established in this House in *Dunlop Pneumatic Tyre Co Ltd v. Selfridge & Co Ltd* ([1915] AC 847).

[102] In *Kepong Prospecting Ltd & Ors v. Schmidt* [1968] 1 MLJ 170, the Privy Council held that the doctrine of privity applies in Malaysia. In delivering the judgment of the Board, Lord Wilberforce said (at p. 174):

> It is true that s 2(d) of the Contracts (Malay States) Ordinance gives a wider definition of 'consideration' than that which applies in England particularly in that it enables consideration to move from another person than the promisee, but the appellant was unable to show how this affected the law as to enforcement of contracts by third parties, and it was not possible to point to any other provision having this effect. On the contrary paras (a), (b), (c) and (e) support the English conception of a contract as an agreement on which only the parties to it can sue.

There is not the slightest room for doubt that the instant case is eminently one in which the respondent was definitely not a party to the purported 2004 agreement and hence could not enforce or rely on its terms and provisions for protection. It was also for the above reasons that we held that the respondent's contention that his pleading had established *locus standi* was wholly devoid of any merit and must be rejected.

[20] We pause to observe at this point that the cause of action available to the respondent arose upon his allegation of the existence of the purported 2004 agreement. It is of some significance to mention that such allegation could not stand because the respondent had failed to establish the existence of such purported agreement when the respondent could not provide or specify the precise date upon which it was entered into. A point of importance that had emerged from this serious omission was that if the purported 2004 agreement ever existed, the respondent ought to have remembered the exact date of the alleged meeting in Singapore in 2004 which led to the conclusion of the agreement in question. In any event, the respondent quite firmly averred that he was also present at the alleged meeting in Singapore. Accordingly, given the importance of the agreement to the respondent and his presence at the alleged meeting, we were left with the feeling that there should be no reason that he could not remember or specify the exact date to which the purported 2004 agreement was made.

[21] Needless to say, it is the respondent's obligation to ensure that all the material particulars and facts necessary to establish his case had been acquired before the filing of the claim and it was not the duty of the appellants to ask for better particulars in order to assist the respondent to sustain his claim (*Pacific Inter-Link Sdn Bhd v. Wilmar Trading Pte Ltd & Ors* [2013] 7 CLJ 312). We think the point is well taken and is supported by authority and we would refer to the case of *Malayan Banking Bhd v. Gan Kong Yam* [1969] 1 LNS 105; [1972] 1 MLJ 32, in which the plaintiff was allowed to strike out the defendant's defence for lack of particulars and in the process Raja Azlan Shah J (as His Royal Highness then was) made the following observation:

A Except for vague dates for example "in or about the year 1966 and subsequent thereto" contained in paragraph 1 of the defendant's particulars, no other significant detail of dates was provided.

[22] It ought to be emphasised that the date for the conclusion of a valid contract, especially an oral one as in this instant appeal, is pertinent and must B be specific to achieve certainty. It does indeed go without saying that a party intending to rely on the oral agreement cannot make an assumption of any date and failure to provide the precise date necessarily means that the plaintiff has failed to prove the existence of the same (*Keongco Malaysia Sdn Bhd v. Ng Seah Hai* [2011] 1 LNS 703; [2012] 7 MLJ 288). The respondent C therefore had failed to plead and provide the material particulars as to the exact date of the purported 2004 agreement at this preliminary stage which was highly prejudicial to the appellants and fatal to the respondent's case.

[23] We wish to add that with regard to this issue, so far as the claim relates to the second appellant, the peculiarity of her case in the statement of defence D and in reply to the respondent's pleaded case that the purported 2004 agreement was made in Singapore, one of the second appellant's main contentions is that she was not at and in fact did not attend the meeting in Singapore when the purported 2004 agreement was allegedly concluded. Without the precise date of the alleged meeting in Singapore, the second E appellant was effectively prevented from providing direct evidence such as immigration records to show that she was indeed not in Singapore at the relevant time. But we should say that the respondent's reply on this aspect failed to provide a serious or clear rejoinder save for the fact that he merely sought to deflect the contention by joining issue with the second appellant preferring it to be determined at the trial instead of providing the precise date F of such meeting. The respondent's claim as it stands and in the light of the failure of the respondent to contradict the second appellant, would undoubtedly justify our finding that the second appellant did not have a case to answer. The trite principle of evidential law clearly supports our conclusion as the failure of the respondent to contradict the positive assertion G of the appellant that she was not present at the purported meeting should be treated as an admission by the respondent of the fact so asserted (see *Johor Capital Holdings Sdn Bhd v. Frank Khoo Shao Hong* [2002] 6 CLJ 288; *Pengiran Othman Shah Pengiran Mohd Yussof & Anor v. Karambunai Resorts Sdn Bhd & Ors* [1996] 1 CLJ 257). We can thus discern from the second appellant's H defence that she was not privy to the purported 2004 agreement. In law, there is no basis for the second appellant to have been made a party to the action where she was not privy to the purported 2004 agreement. As a general rule, the doctrine of privity of contract enables only the original party to a contract to sue or be sued upon it, so that a third party does not enjoy the right to I sue and incurs no liability to be sued (see *Chong Nyuk Fung & Anor v. Loi Lung Kiong & Ors* [1998] 5 CLJ 146; *Brilliant Team Management Sdn Bhd v. South East Pahang Oil Palm Sdn Bhd & Ors* [2006] 2 CLJ 1218).

[24] At this stage, we wish to emphasise that we accept of course the trite legal principle that no evidence shall be admissible on an application under O. 18 r. 19 (1)(a) of the Rules of Court 2012 and that we shall only consider the pleadings to decide whether on the face of it, we are prepared to say that the respondent's claim does not disclose a reasonable cause of action (see *Berjaya Development Sdn Bhd v. Keretapi Tanah Melayu Bhd & Anor* [2007] 6 CLJ 687; [2007] 7 MLJ 489; *New Straits Times (Malaysia) Bhd v. Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 LNS 1; [1985] 1 MLJ 226). The above analysis to the respondent's amended statement of claim as well as the appellants' defences and the application of the case authorities above, clearly demonstrate and is more than sufficient to support our inevitable conclusion that by merely looking at the pleadings, it is plain and obvious that the respondent has no reasonable cause of action. In coming to this conclusion, we are guided by the Supreme Court's case of *Sim Kie Chon v. Superintendent of Pudu Prison & Ors* [1985] 2 CLJ 449; [1985] CLJ Rep 293 which authoritatively held that on an application to strike out a statement of claim under O. 18 r. 19(1)(a) of the Rules of Court 2012, the right course for this court to take is to strike out the claim if we are satisfied that the claim does not disclose a reasonable cause of action. On this ground alone, the appeals must be allowed and the respondent's claim struck out.

[25] In any case, there are further reasons for allowing the appeals. The respondent alleged in para. 19 of the amended statement of claim that the appellants purportedly held the TKCH's shares on bare trusts for the fourth defendant. The learned judge appeared to have been swayed by the respondent's submission on this issue in dismissing the appellants' applications. However, it was evident from the pleadings that it was an irrefutable fact that the appellants remained the respective registered owners of their TKCH's shares. That being the case, if there was any truth that there existed any form of trust as alleged, such trust was incompletely constituted. To put it in another word, there was no trust in existence and the appellants remained the absolute owner of the TKCH's shares. We would further hold that at all material times, the respondent was merely a volunteer as he had not given any form of valuable consideration for the creation of the alleged trust. We make this finding as it is obvious, settled and trite rule of equity that a court of equity will not assist a volunteer in the case of an incompletely constituted trust. Such principle is supported by authority and reference in this connection may be made to the decision of the Supreme Court in *Yeong Ah Chee v. Lee Chong Hai & Anor And other Appeals* [1994] 3 CLJ 20; [1994] 2 MLJ 614 in which it was held:

> The plaintiffs were all volunteers who had not given any valuable consideration for the creation of the trust. It is a settled rule of equity that a court of equity would not render assistance to a volunteer in the case of an incompletely constituted trust where the trust property has not been finally and completely vested in the trustee.

[26] The action brought by the respondent was at best premature in light of the fact that the fourth defendant must claim for the said shares from the appellants first. The respondent's rights, based on his current pleaded facts if at all, would only exist once the fourth defendant had exercised his rights as the alleged beneficiary of the said shares. The respondent's alleged rights which he asserted as having been directly affected (if any) would only arise on the demise of the fourth defendant. Based on the reasons aforementioned, we do not think that anything material turns on the respondent's allegation of bare trusts. The declarations sought by the respondent has the effect of asking the court to enforce an alleged trust and this suit is all the more without basis, unarguably frivolous and a blatant abuse of process of the court. The learned judge did not seem to realise that the respondent's argument on this point was fallacious and thus had erroneously taken into consideration the respondent's contention that a trust was created between the appellants and the fourth defendant in which the TKCH's shares were held by the former in trust for the latter.

[27] The argument before us was also directed on the issue that the respondent's action was scandalous, frivolous and vexatious. It brings to focus the contention that the respondent's cause of action, regardless of it being founded on contract or on trust, is barred by limitation and that his conduct which can be succinctly described as 'inaction with one's eye open' is estopped by an equitable defence of laches and acquiescence from filing this suit. The appellants undoubtedly took issue on the fact that the learned judge failed to give due consideration to this material point. It therefore remains an open question for this court to consider at this juncture. We would start off by asking the obvious question which is whether the plea of limitation is pleaded in the pleadings assuming there is a cause of action that avoids the other two reasons we have already addressed. Our reading of the appellants' defences clearly reveals that the plea of limitation is indeed pleaded therein in that the respondent's claim is time-barred by virtue of s. 6(1)(a) of the Limitation Act 1953. The main bone of contention between counsel for the appellants and the respondent on this point centred on the precise date of the accrual of the cause of action. The respondent's counsel submitted that the cause of action accrued only on 30 November 2015 as it was on that date that the appellants allegedly sought to illegally remove the respondent as a director of TKCH. Prior to that date, the respondent argued, there was no breach of the purported 2004 agreement. On the contrary, taking the respondent's case at its highest, the appellants' counsel submitted that time would begin to run from 27 May 2004 after the completion of median vision's sale and purchase agreement, or time would begin to run from 30 July 2006 when Madam Chang Ying passed away.

[28] The issue for determination therefore boils down to the precise date the limitation period would set in. It is the appellants' case that the respondent's cause of action, was statute barred by virtue of s. 6(1)(a) of the Limitation Act 1953 given that more than six years had lapsed from the time of the accrual of the cause of action. Section 6(1)(a) of the Limitation Act 1953 provides as follows:

> Save as hereinafter provided the following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued, that is to say:
>
> (a) actions founded on a contract or on tort.

Mindful of the respondent's pleaded case that his cause of action revolved around the appellants' alleged failure to carry out the obligations under the purported 2004 agreement, we were satisfied that the cause of action could not have accrued on 30 November 2015, it had in fact already accrued on 30 July 2006. The reason is this. Pursuant to the purported 2004 agreement, it was alleged that the appellants agreed to transfer their shares to the fourth defendant and Madam Chang Ying, but they failed to do so. When Madam Chang Ying died on 30 July 2006, the appellants refused or failed to transfer their shares to the fourth defendant. We may mention in this regard that one of the reliefs sought by the respondent is an order for the appellants to transfer their shares to the fourth defendant. Clearly, the precise date from which time would start to run would be the date of the demise of Madam Chang Ying as this was the date, we would not hesitate to hold, the respondent's cause of action founded on a contract would have arisen which was the date of its breach (*Sampo Materials (M) Sdn Bhd v. Tenaga Nasional Bhd* [2015] 9 CLJ 902; [2016] 1 MLJ 375 at p. 381). The underlying or ultimate outcome from this delay was that limitation therefore set in after a slumber of nine years when the respondent commenced this action on 24 November 2015 which in the result effectively rendered the respondent's claim obviously unsustainable with no chance of success. We therefore held that s. 6 of the Limitation Act 1953 applied and consequently the respondent was precluded from bringing this action against the appellants. It might be apposite to emphasise that our decision remained the same even if the relevant date to determine the precise time the cause of action would accrue was 27 May 2004 for the obvious reason that whichever of these two dates were taken, the claim was already barred by limitation.

[29] The appellants had also complained that the reliefs sought could not be realised due to laches, acquiescence and delay arising from inaction or lack of positive action by both the fourth respondent and the estate of Madam Chang Ying to enforce the purported bare trusts. The authority on which the appellants principally relied on this point was the case of *Choong Howei v.*

Cheah Choo Eng & Ors And Another Appeal [2015] 9 CLJ 689; [2015] 6 MLJ 95 where the relevant excerpts at p. 704 (CLJ); p. 111 (MLJ) thereof are reproduced below:

> The often cited principle on laches is well stated by Lord Selborne in the landmark case of *Lindsay Petroleum Co v. Hurd* (1874) LRPC 221:
>
> > But in every case if an argument against relief which otherwise would be just is founded on mere delay, that delay of course not amounting to a bar by any Statute of Limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are the length of the delay, and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other so far as relates to the remedy.
>
> A local authority on the principle on laches can be found in *Alfred Templeton & Ors v. Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202 where Edgar Joseph Jr J of the High Court of Penang held:
>
> > Laches is an equitable defence implying lapse of time and delay in prosecuting a claim. A court of equity refuses its aid to a stale demand where the plaintiff has slept upon his rights and acquiesced for a great length of time. He is then said to be barred by laches. In determining whether there has been such a delay as to amount to laches the court considers whether there has been acquiescence on the plaintiff's part and any change of position that has occurred on the part of the defendant. The doctrine of laches rests on the consideration that it is unjust to give a plaintiff a remedy where he has by his conduct done that which might fairly be regarded as equivalent to a waiver of it or where by his conduct and neglect he has, though not waiving the remedy, put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted: 14 *Halsbury's Laws of England* (3rd Ed) paras 1181, 1182. Laches has been succinctly described as 'inaction with one eye's open'.
>
> In the present case on the facts it is clear to us that the respondents had slept upon their rights and acquiesced for a great length of time. Thus the respondents by reason of the inordinate delay and their conduct are estopped from challenging the validity of the order of 9 November 2010 or the validity of the two AGMs.

[30] The inaction by the fourth respondent, the late Madam Chang Ying and subsequently the estate of Madam Chang Ying from 2004 until the present day is obvious. We would not, in the light of overwhelming evidence, hesitate to say that it is plain that they had been quiescent for an inordinately long time. The respondent is now seeking various reliefs from the court. We need only say in this case that on the facts, it is now obvious

to us that such long lapse of time would deny any rights that the respondent may have as the equitable doctrine of laches and acquiescence as provided under s. 32 of the Limitation Act 1953 would prevail over the remedies sought by the respondent.

[31] With due respect to the learned judge, Her Ladyship had erred in fundamental respect of this case when she failed to give due consideration to the fact that since the passing of Madam Chang Ying in 2006 until November 2015, the respondent had slept upon his alleged rights and not taken any steps to exercise such alleged rights under the alleged contract or trust. However, the respondent only decided to take such action upon the fourth defendant having been incapacitated in August 2015 through a stroke. The respondent's acquiescence had caused the reliefs sought to be utterly destroyed due to the fact of unexplained idleness. He had not taken any action all these years but chosen to do so immediately after the fourth respondent became bedridden and was unable to make any decisions. The doctrine of laches has clearly manifested in the respondent's indolence in prosecuting his claim. Premised on the aforesaid, the respondent's claim against the appellants was clearly frivolous and vexatious rendering it obviously unsustainable given that the respondent had failed to explain the delay since 2004 when the purported 2004 agreement was agreed upon and subsequently after Madam Chang Ying's demise in 2006.

[32] The appellants' case before this court also centred on their contention that the respondent's action herein was a blatant abuse of the process of the court in the sense that his action was *mala fides* in nature. Having considered the entire matrix of actual facts of the case, we were of the considered opinion that the respondent's action, as we were able to discern from the pleadings, was indeed lacking *bona fides* and was an abuse of the process of the court. Such action was amply demonstrated by the fact that the respondent filed this suit on behalf of his father, the fourth defendant, without his instructions and subsequently changed and amended the capacity of his father from the first plaintiff at a preliminary stage in this action to the fourth defendant. It is trite law that an abuse of the process of the court arises under O. 18 r. 19(1)(d) of the Rules of Court 2012 where the process of the court has not been used in a *bona fide* manner and has been abused (*Harapan Permai Sdn Bhd v. Sabah Forest Industries Sdn Bhd* [2011] 1 CLJ 285; [2011] 2 MLJ 192). This court will not assist nor grant the reliefs sought by the respondent who comes to court with questionable intention and accordingly the bottom line is that such conduct attracts the application of O. 18 r. 19(1)(d) of the Rules of Court 2012 and the inherent jurisdiction to prevent abuse of the court's process (*Raja Zainal Abidin Raja Haji Tachik & Ors v. British-American Life & General Insurance Bhd* [1993] 3 CLJ 606; [1993] 3 MLJ 16).

A

Conclusion

[33] For all these reasons, it would be our inevitable finding that the conclusion reached by the learned judge in dismissing the appellants' applications was unreasonable and erroneous. It was plain and obvious that the respondent's claim under consideration in this appeal was wholly unmeritorious and clearly disclosed no reasonable cause of action and was scandalous, frivolous, vexatious as well as an abuse of the process of the court for which we had absolutely no hesitation in dismissing the claim *in limine*. We were completely satisfied that a trial of this action would not reveal or add anything more to what was already before us. In the event, we allowed all the three appeals, set aside the orders of the learned judge dated 26 April 2016 and granted order in terms of the appellants' applications. We also ordered costs of RM5,000 to be paid by the respondent to the appellants for each appeal subject of course to the payment of allocatur fees.

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